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Supreme Court of the United States

OCTOBER TERM, 1945

No. 1161

SAFEWAY STORES, INCORPORATED, *Petitioner*,

v.

PAUL A. PORTER, Price Administrator.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES EMERGENCY COURT OF APPEALS AND BRIEF IN SUPPORT THEREOF

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PRESS OF JUDD & DETWEILER, INC., WASHINGTON, D. C.

INDEX

Subject Index

TABLE OF CASES CITED

STATUTES CITED

Supreme Court of the United States

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No. 1161

SAFEWAY STORES, INCORPORATED, *Petitioner,*

v.

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To the Honorable the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Safeway Stores, Incorporated, respectfully petitions for a writ of certiorari to the United States Emergency Court of Appeals to review a judgment (Rec. 81) of said Court entered on March 29, 1946.

The opinion (R. 78) of the Emergency Court of Appeals is not yet reported.

A

STATEMENT OF MATTER INVOLVED

This case is based on a protest filed by petitioner against Amendment 32 (9 F. R. 12590) to Maximum Price Regulation 422 (8 F. R. 9395) issued by the Price Administrator. MPR 422 established ceiling prices for certain foods sold at retail in Group 3 and Group 4 stores.

Petitioner is a corporation organized and existing under the laws of the State of Maryland with its principal office located in Oakland, California. It operates, as a single corporate entity, more than 2,300 retail food stores in 23 states of the United States and in the District of Columbia. It is a chain store organization within the meaning of the Price Administrator's regulations. Its retail stores are classified in Group 3 or Group 4 and therefore must depend upon MPR 422 for their entire retail mark-ups.[1] (R. 62.)

Petitioner makes substantial purchases of fresh fruits and vegetables in carlot and trucklot quantities from growers, country shippers, intermediate sellers, and/or grower-packers. It then performs functions which are ordinarily performed by a country shipper, a broker or shipper's sales agent, a commission merchant, a carlot distributor, a carlot receiver, or first jobber, and a secondary jobber or service wholesaler, for which functions petitioner is granted (with minor exceptions) a single, over-all allowance of only 1½% by Amendment 32 to MPR 422. Most, if not all, of these functions must be performed before the merchandise is received by the retail store. A specific allowance is provided for the performance of each function by all persons performing such except petitioner and other direct-buying retailers.[2] (R. 62-63.)

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[1] While the majority of petitioner's more than 2,300 stores are classified in Group 3, petitioner charges the lower Group 4 prices in all of its stores in the same trading area, irrespective of the sales volume of a particular store. When OPA issued its retail pricing regulations, petitioner was confronted with the problem of abandoning its one-price policy in order to take advantage of the higher Group 3 store prices or of adhering to that policy in the interest of maintaining the good will of its customers. It adhered to the policy.

[2] The functions performed by others and for which specific allowances are granted are as follows:

(1) *Grower.* The grower is the person who actually produces the merchandise. (He may also act as a country shipper.)

Petitioner is in active competition, in its various trading areas, with all persons who perform these functions and who receive therefor substantial and specific allowances. However, until the issuance of Amendment 32 no allowance (with minor exceptions) was provided for the performance of these functions by petitioner and others similarly situated. (R. 63.)

Between July 3 and September 2, 1943, petitioner filed a series of protests to MPR 271, MPR 390, MPR 421, MPR

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(2) *Country Shipper.* The country shipper is the person who prepares the commodities for shipment. This generally involves sorting, grading, sizing, trimming, packaging, etc.

(3) *Broker or Shipper's Sales Agent.* The broker, or shipper's sales agent, means a person who, for a fee, sells merchandise on behalf of his principal without packing or otherwise handling any part thereof. In other words, he normally does not have physical possession of the goods themselves. Therefore, he does not usually have charge of receiving or loading them, but merely maintains contact between the seller (his principal) and the buyer.

(4) *Carlot Distributor.* A carlot distributor is any person, other than a country shipper, who purchases in carlot or trucklot quantities and resells without breaking the original carlot or trucklot unit. The sales may be made at terminal markets or other wholesale receiving points. (See MPR 271, Section 10.)

(5) *Carlot Receiver* (or First Jobber). A carlot receiver, frequently called a first jobber, is any person who buys for profit in unbroken carlot or trucklot quantities for the purpose of reselling in lesser quantities to persons other than the ultimate consumer. (See MPR 426, Appx. H.)

(6) *Secondary Jobber* (or Service Wholesaler). For all practical purposes, a secondary jobber, or a service wholesaler, is a person other than a retailer who for profit purchases goods in carlot or trucklot quantities, or less, and resells them in less than carlot or trucklot to any other person. The only substantial difference is that a service wholesaler is permitted to take an additional allowance when he resells in quantities of less than one-half a container. (See MPR 426, Appx. H.)

(7) *Retailer.* A retailer is a person who sells to the ultimate consumer and who, under the regulations, is divided into four groups based upon volume of sales and type of ownership. Petitioner's stores fall in Group 3 and Group 4 but because of Petitioner's historic policy all of its merchandise is sold at Group 4 prices in areas where it operates both Group 3 and Group 4 stores.

422, MPR 426, and General Order 51, Amendment 2. All six protests were consolidated and denied. Petitioner then filed complaints with the Emergency Court of Appeals.

While the complaints were pending in that court, the Administrator, on October 16, 1944, issued Amendment 32 to MPR 422 which permitted retailers who purchase fresh fruits and vegetables in carlot or trucklot quantities from growers, country shippers, primary sellers, or growers-packers to add 1½% to the delivered cost of such items in computing the net cost base to which the maximum markups of MPR 422 are applied.[3] The amendment was issued in purported pursuance of Section 2 of the Emergency Price Control Act, 56 Stat. 23, 50 U. S. C. Appx. § 901.

In his Statement of Considerations accompanying Amendment 32 the Administrator stated (R. 45):

> ". . . By this action sellers who perform unusual functions are placed in the same position with respect to ceiling prices as retailers who obtain their supplies at a later stage in the distribution process and whose

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[3] Amendment No. 32 (9 F. R. 12590) added the following paragraph to Section 20 of MPR 422:

> "(p) *Fresh fruits or vegetables bought in carlot or trucklot quantities.* If you purchase any item of fresh fruits or vegetables listed in Table B, in 'carlot' or 'trucklot' quantities, from a 'grower', 'country shipper', 'primary seller' or 'grower-packer' (as those terms are defined in the applicable maximum price regulation covering the sale of the item except at retail), figure your ceiling price for that item in the following way: Start with the amount paid for the quantity of the item delivered, less all discounts except the discount for prompt payment. Add to that figure all transportation charges you paid to your usual receiving point, which may include costs for icing, refrigeration, and ventilation, but not costs for local trucking or local unloading. (If you perform, in connection with any item any of the functions described in paragraphs (f), (g) or (h) of this section, start with the figure computed for that item under the applicable paragraph.) Increase that figure by 1½ percent. Reduce the resulting figure to the 'net cost' per 'selling unit' and apply the mark-ups for your group of retailer as set forth in section 8."

'net cost' already reflect complete acquisition expense."[4]

The Administrator further observed (R. 47):

> "The accompanying action is *tentative* in nature, and is designed as a *corrective measure until complete economic data can be obtained.* Upon the basis of a *preliminary* study, it appears that an increase of 1½ percent . . . is a proper allowance. The Price Administrator *proposes a more detailed survey* of the nature and costs of the prewarehousing function for which a greater or lesser allowance, as warranted, will be made." (Emphases supplied.)

The Administrator did *not* find that the amendment was "generally fair and equitable" and would "effectuate the purposes of the Emergency Price Control Act", but he did note that the Economic Stabilization Director had approved the issuance of the amendment as being justified in order to correct a "gross inequity." (R. 47.)

The fact that this 1½% allowance had been tentatively provided, with a proposal for a "more detailed survey" was submitted to the Emergency Court by the Administrator in a supplemental memorandum. This occurred after

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[4] Petitioner's protest was based, inter alia, upon the fact that Amendment 32 did not place petitioner "in the same position with respect to ceiling prices as retailers who obtain their supplies at a later stage in the distribution process." Ceiling prices under MPR 422 are based upon cost of acquisition plus a percentage markup thereon. As an illustration of the inequity imposed upon petitioner by the failure of the Administrator to place it in the same position as its Group 4 competitors who buy from a wholesaler, the following is typical: On carrots grown in California and sold in New York the cost. if bought from a wholesaler with the intervening functional allowances included, would be $5.673 per crate as against the cost allowed to petitioner, which performs all of the same intervening functions, of $4.85 per crate under Amendment 32. Ceiling prices then are fixed by adding 40% of the cost, in either case, thus giving petitioner's Group 4 competitors a much higher price (R. 7).

argument but prior to the decision of the court. The question of the actual amount which was allowed or which should be allowed was not before the court and attention was called to the fact that petitioner did not admit that the 1½% allowance was equitable. (R. 64.) In other words, the action of the Administrator in making available this allowance after the argument made moot the issue regarding the virtual absence of pre-retail allowances for direct-buying retailers, such as petitioner, and left for future determination the question as to whether the 1½% thus belatedly provided was arbitrary, discriminatory, and/or inequitable.

Petitioner's complaints were dismissed on November 29, 1944. In its opinion, the court mentioned Amendment 32 but did not discuss its effect on petitioner's objections. *Safeway Stores v. Bowles,* 145 F. (2d) 836.

On July 24, 1945, after it had become obvious that the Administrator did not intend to make the "more detailed survey" promised in the Statement of Considerations, petitioner filed a protest to Amendment 32. (R. 1.) This protest was denied on November 7, 1945. (R. 15.)

Petitioner then filed a complaint with the Emergency Court of Appeals. (R. 62.) This complaint was dismissed on March 29, 1946. (R. 81.)

B

JURISDICTION

The jurisdiction of this Court is invoked under Section 204(d) of the Emergency Price Control Act, 50 U. S. C. App. § 924(d), 56 Stat. 31. The complaint was dismissed by the Emergency Court on March 29, 1946. (R. 81.)

C

QUESTIONS PRESENTED

The primary questions presented are—

(1) Whether the Emergency Court of Appeals may, by resorting to the rule of *res judicata,* refuse to review the propriety of a new amendment to a Maximum Price Regulation, which amendment has necessarily never before been the subject of a protest as provided by the Price Control Act.

(2) Whether the refusal of the Emergency Court to consider petitioner's contentions in opposition to the statutory propriety of the new amendment (No. 32) to Maximum Price Regulation 422 deprives petitioner of the right of review and offends against the due process clause of the Fifth Amendment to the Constitution of the United States.

(3) Whether there must be a substantial basis for any action by the Administrator.

(4) Whether the Emergency Court may, prejudicially, impose a requirement upon petitioner while not imposing it upon others.

REASONS FOR THE ALLOWANCE OF THE WRIT

1. *The Emergency Court was arbitrary and capricious in refusing to consider petitioner's objections to Amendment 32 to MPR 422, and its ruling that these objections were res judicata is in conflict with applicable decisions of this Court.* The precise question raised by its issuance was not and could not have been presented to the lower court until after the Administrator denied a protest against the amendment. The ruling of the lower court that petitioner's objections to the amendment are *res judicata* is in conflict with the decisions of this Court in *Russell v. Place,* 94 U. S.

606, 24 L. ed. 214, and subsequent cases establishing the standards to be used in determining whether a question is *res judicata*. Therefore, the action of the Emergency Court should be reviewed.

2. *The mere assumption by the Emergency Court, without any substantial basis, that Amendment 32 is a valid price regulation is contrary to applicable decisions of this Court, and its disregard for petitioner's evidence that the allowance provided was grossly inequitable and discriminatory makes a mockery of petitioner's right of appeal.* There was no substantial basis for the Administrator's action as required by this Court in *Yakus v. United States*, 321 U. S. 414, 88 L. ed. 834. The Administrator did not even find that the amendment was generally fair and equitable and would effectuate the purposes of the Price Control Act. He merely found that the allowance provided was tentative, based upon a preliminary study, and designed as a corrective measure until complete data could be obtained, and he proposed to make a more detailed survey. This he never did. Petitioner offered evidence to show that the allowance was grossly inequitable and discriminatory, but the lower court refused to accept it. Such action, especially in the absence of any showing of a substantial basis therefor by the Administrator, makes any judicial review of the Administrator's position only an empty form. The Court should review this decision in order to safeguard the right of review granted petitioner by the Act, and also the right of due process guaranteed by the Fifth Amendment to the Constitution.

3. *The decision of the Emergency Court of Appeals in the present case is in conflict with its decision in Booth Fisheries Corporation v. Bowles, 153 F. (2d) 449.* Although similar questions were presented in these two cases, the Emergency Court reached conflicting results in deciding them. This Court should grant certiorari in the present

case and resolve the conflict on this question in order to secure a uniform and impartial administration of the Act.

Wherefore, petitioner prays that a writ of certiorari be issued to review the judgment of the United States Emergency Court of Appeals in the above entitled cause, that said judgment be reversed, and that petitioner may have such other and further relief in the premises as to this Honorable Court may seem meet and proper.

Respectfully submitted,

ELISHA HANSON,
ELIOT C. LOVETT,
Counsel for Petitioner.

April 27, 1946.

Supreme Court of the United States

OCTOBER TERM, 1945

No. 1161

SAFEWAY STORES, INCORPORATED, *Petitioner*,

v.

PAUL A. PORTER, Price Administrator

BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

I

OPINION BELOW

The opinion (R. 78) of the United States Emergency Court of Appeals was rendered on March 29, 1946, and is not yet reported.

II

JURISDICTION

The judgment of the Emergency Court was entered on March 29, 1946. (R. 81.) The jurisdiction of this Court is invoked under Section 204 (d) of the Emergency Price Control Act of 1942, 56 Stat. 31, 50 U. S. C. Appx. § 924 (d).

III

STATEMENT OF THE CASE

A full statement of the case has been given under heading "A" of the Petition (pp. 1-6 herein) and it is incorporated here by reference.

IV

SPECIFICATION OF ERRORS

1. The Emergency Court erred in entering a judgment dismissing the complaint.

2. The Emergency Court erred in holding that petitioner is barred by principles of *res judicata* from questioning the propriety of Amendment 32 on the ground of discrimination or for any other reason.

3. The Emergency Court erred in failing to hold that the Administrator had presented no substantial basis for the issuance of Amendment 32.

4. The Emergency Court erred in holding that Amendment 32 was a binding and valid price regulation.

5. The Emergency Court erred in refusing to hold that Amendment 32 presented a grossly inequitable and discriminatory situation.

6. The Emergency Court erred in refusing to grant the relief requested.

V

QUESTIONS PRESENTED

The primary questions presented are—

(1) Whether the Emergency Court of Appeals, may, by resorting to the rule of *res judicata,* refuse to review the

propriety of a new amendment to a Maximum Price Regulation, which amendment has necessarily never before been the subject of a protest as provided by the Price Control Act.

(2) Whether the refusal of the Emergency Court to consider petitioner's contentions in opposition to the statutory propriety of the new amendment (No. 32) to Maximum Price Regulation 422 deprives petitioner of the right of review and offends against the due process clause of the Fifth Amendment to the Constitution of the United States.

(3) Whether there must be a substantial basis for any action by the Administrator.

(4) Whether the Emergency Court may, prejudicially, impose a new requirement upon petitioner while not imposing it upon others.

VI

STATUTORY PROVISIONS

The provisions of the Emergency Price Control Act of 1942, 56 Stat. 23, as amended, 50 U. S. C. App. § 901, et seq., insofar as pertinent to the questions here presented, follow:

> "Sec. 2. (a) . . . the Price Administrator . . . may by regulation or order establish such maximum price or maximum prices as in his judgment will be generally fair and equitable and will effectuate the purpose of this Act . . ."
>
> "Sec. 204. (a) . . . Upon the filing of such complaint the court shall have exclusive jurisdiction to set aside such regulation, order, or price schedule, in whole or in part, to dismiss the complaint, or to remand the proceeding: . . .
>
> "(b) No such regulations, order, or price schedule shall be enjoined or set aside, in whole or in part,

unless the complainant establishes to the satisfaction of the court that the regulation, order, or price schedule is not in accordance with law, or is arbitrary or capricious. . . ."

Section 1 of the Stabilization Act of 1942, 56 Stat. 765, 50 U. S. C. Appx. § 961, is also applicable:

"In order to aid in the effective prosecution of the war, the President is authorized and directed, on or before November 1, 1942, to issue a general order stabilizing prices, wages, and salaries, affecting the cost of living; and, except as otherwise provided in this Act, such stabilization shall so far as practicable be on the basis of the levels which existed on September 15, 1942. The President may, except as otherwise provided in this Act, thereafter provide for making adjustments with respect to prices, wages, and salaries, to the extent that he finds necessary to aid in the effective prosecution of the war or to correct gross inequities: . . ."

VII

SUMMARY OF ARGUMENT

Point 1. The Emergency Court acted arbitrarily and capriciously in ruling that petitioner's objections to Amendment 32 were *res judicata*, such ruling being contrary to the principle established by this Court in *Russell v. Place*, 94 U. S. 606, 24 L. Ed. 214. The precise question presented here, namely, the propriety of Amendment 32, was not before the Emergency Court in any former case. Petitioner's objections to the amendment could not have been adjudicated until the institution of a protest proceeding after the amendment was issued. The instant case is the first and only one of that nature. The doctrine of *res judicata* cannot, therefore, apply.

Point 2. There was no substantial basis for the allowance of only 1½% as provided in Amendment 32. The Administrator, therefore, failed to meet the requirement *of this Court as expressed in Yakus v. United States,* 321 U. S. 414, 88 L. ed. 834. He did not even find that the amendment was generally fair and equitable, but only that it was tentative, based upon a preliminary study, and designed as a corrective measure until complete data could be obtained. Petitioner's showing that the 1½% allowance was grossly inequitable and discriminatory was ignored by the lower court, and petitioner's right of review was thereby denied in contravention of the statute and of the due process clause of the Fifth Amendment to the Constitution.

Point 3. The decision of the Emergency Court herein is in conflict with its decision in *Booth Fisheries Corporation v. Bowles,* 153 F. (2d) 449. A different rule is imposed upon petitioner to the prejudice of the latter. In order to effect an impartial and uniform administration of the Act this Court should establish an overall policy applicable to the treatment of retailers who perform pre-retail functions.

VII

ARGUMENT

Point 1. The Emergency Court of Appeals was arbitrary and capricious in refusing to consider petitioner's objections to Amendment 32, and its ruling that these objections were res judicata is in conflict with decisions of this Court.

The Emergency Court of Appeals was arbitrary and capricious in refusing to consider petitioner's objections to Amendment 32 to MPR 422. In effect, it denied petitioner its day in court.

This amendment was issued while a complaint filed by petitioner against a denial of a protest under MPR 422 was pending in the Emergency Court, but petitioner did not present its objections to the amendment in that proceeding. In fact, under the terms of the Act, petitioner could not have done so because those objections did not, obviously, appear in its protest. *Armour & Co. of Delaware v. Brown,* 137 F. (2d) 233.

Petitioner relied on the Administrator's statement that the provision for a 1½% allowance was "tentative" and that he proposed a "more detailed survey of the nature and costs of the prewarehousing function." It was not until it became apparent that the Administrator did not intend to make this survey and adjust the allowance that petitioner filed its protest to Amendment 32.

Petitioner's protest was timely. Under Section 203(a) of the Price Control Act, as amended, any person subject to a provision of a regulation or order may file a protest at any time after the issuance thereof. This section, as originally enacted, had provided that all protests (except those based solely on grounds arising after the expiration of 60 days) must be filed within 60 days after the issuance of a regulation or order. When the Act was amended in 1944, the new provision was substituted in order to protect the right of protest in cases such as the present.

Petitioner, therefore, did not lose its right to protest by waiting to see whether the expected adjustment of the allowance granted in Amendment 32 would be equitable. It was not until petitioner realized that the Administrator did not intend to make any such adjustment whatsoever that petitioner had cause to protest Amendment 32. See *United States Gypsum Co. v. Brown,* 137 F. (2d) 803, certiorari denied, 320 U. S. 799.

Then, for the first time, petitioner presented its objections to Amendment 32. Both the Administrator and

the Emergency Court refused to consider certain of these objections because petitioner had previously objected to MPR 422 *before this amendment had become effective.* Thus, petitioner was denied the right of a full hearing on its objections to this amendment.

The conclusion that these questions are *res judicata* is in conflict with decisions of this Court. In *Russell v. Place,* 94 U. S. 606, 607, 24 L. ed. 214, 215, this Court stated the rule:

> "It is undoubtedly settled law that a judgment of a court of competent jurisdiction, upon a question directly involved in one suit, is conclusive as to that question in another suit between the same parties. But to this operation of the judgment it must appear, either upon the face of the record or be shown by extrinsic evidence, that *the precise question was raised and determined* in the former suit. . . ." (Emphasis supplied.)

Accordingly, in *Oklahoma v. Texas,* 256 U. S. 70, 87, 65 L. ed. 831, 835, this Court, citing *Russell v. Place,* supra, pointed out that:

> ". . . in a subsequent suit upon a different cause of action, the question whether the matter decided on the former occasion was within the issues then proper to be decided, or was presented and actually determined in the course of deciding those issues, is open to inquiry, and that, unless it be answered in the affirmative, the matter is not *res judicata.*"

The precise question presented herein—the propriety of Amendment 32—was not before the Emergency Court in the former case. The amendment was not even issued until after that case had been argued. Petitioner's objections were not, and could not have been, adjudicated at that time. Perforce, the Emergency Court did not determine whether the 1½% allowance provided by Amendment 32 is arbitrary, discriminatory, and/or inequitable.

It is thus apparent that petitioner's objections to Amendment 32 were not *res judicata* under the tests established by this Court. The refusal of the lower court to consider them in the present case was arbitrary and capricious. If this ruling be allowed to stand, the Administrator will be able, through the use of the delaying tactics practiced in the instant case, to limit a person's right to present fully his objections to regulations and obtain the judicial review provided by the Act.

Point 2. The mere assumption by the Emergency Court, without any substantial basis, that Amendment 32 is a valid price regulation, is contrary to the decisions of this Court, and its disregard for petitioner's evidence that the allowance provided was grossly inequitable and discriminatory makes a mockery of petitioner's right of appeal and offends against the due process clause of the Constitution.

This Court, in *Yakus v. United States,* 321 U. S. 414, 423, 88 L. ed. 834, 847, held that there must be a "substantial basis" for the Administrator's findings.[5]

During the course of a proceeding before the Emergency Court in which there was brought in question the failure of the Administrator to make available to petitioner an allowance for the performance of pre-warehousing functions, the Administrator issued Amendment 32 providing a 1½% allowance for certain such functions. This last-minute

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[5] This Court stated:

". . . In short, the purposes of the Act specified in § 1 denote the objective to be sought by the Administrator in fixing prices—the prevention of inflation and its enumerated consequences. The standards set out in § 2 define the boundaries within which prices having that purpose must be fixed. It is enough to satisfy the statutory requirements that the Administrator finds that the prices fixed will tend to achieve that objective and will conform to those standards, and that the courts in an appropriate proceeding can see that substantial basis for those findings is not wanting."

action on the part of the Administrator made moot the question of his previous failure but did not determine the propriety of the 1½% allowance.

In approving the issuance of the amendment, the Economic Stabilization Director stated that the 1½% allowance was "necessary to correct a gross inequity." (R. 47, 64.) This was the very same gross inequity of which petitioner had previously complained. But the allowance provided was not to be considered final. It was merely "designed as a corrective measure until complete economic data can be obtained"; it was based upon a "preliminary study". (R. 47.)

In his Statement of Considerations (R. 45) the Administrator made no explanation of the manner in which he arrived at the 1½% allowance. There was no basis, substantial or otherwise, for the allowance. The fact that it was characterized as only "tentative"—the result of a "preliminary study", showed that *basic facts were yet to be determined.*

In view of this tentative nature of the amendment it is not surprising that the Administrator made no finding that it was "generally fair and equitable" and would "effectuate the purposes of the Emergency Price Control Act". Such a finding was made in connection with Amendment 31 (R. 44-45), Amendment 44 (R. 51-53), Amendment 45 (R. 53-54), Amendment 46 (R. 54-55), Amendment 48 (R. 55-56), Amendment 51 (R. 57), Amendment 54 (R. 58), Amendment 55 (R. 58-59), and Amendment 61 (R. 59-60). But those amendments were not, as was Amendment 32, the result of a mere preliminary study, to be followed by a more detailed survey. They at least purported to have a substantial basis in fact as required by this Court.

Despite the complete failure of the Administrator to comply with the requirement of this Court as expressed in the *Yakus* case, the Emergency Court held that Amendment 32

is "a binding price regulation which is presumed to be valid unless and until the complainant establishes its invalidity by competent evidence." (R. 80.)

Petitioner has no way of knowing the basis for the Administrator's decision to provide the 1½% allowance other than that it was grossly inequitable to provide nothing. It may have been that the Administrator made only four or five inquiries within the trade and that someone suggested 1½% under a misapprehension of what it was to cover. Suffice it to say, there must have been very little basis for the particular percentage; otherwise, the Administrator would not have proposed a "more detailed survey". (R. 47.) Such a survey was never made. Nevertheless, the Emergency Court would give the tentative allowance the same sanctity as one having the "substantial basis" required by this Court.

Not only did the Administrator profess to correct a gross inequity, but he also claimed that the 1½% allowance placed integrated chain store organizations such as petitioner "in the same position with respect to ceiling prices as retailers who obtain their supplies at a later stage in the distribution process". (R. 45.) Thus he purported to remove certain *discrimination* which also existed.

Petitioner explained to the Emergency Court the reason why the situation, in spite of the 1½% allowance, was grossly inequitable and discriminatory. It showed how, in actual typical purchases of fresh fruits and vegetables in California, the allowances to others exceeded the allowance to petitioner and similarly situated chain store organizations for performing the same services by 782.3% to 1150% where the commodity was shipped to New York City, and by 1062.79% to 1900% where distribution was local.

The Emergency Court ignored petitioner's showing of this discriminatory and grossly inequitable condition which existed after the application of the 1½% allowance pursu-

ant to Amendment 32. It did this by applying the rule of *res judicata* and referring to a record made *before* the issuance of the amendment. The Court held that, in any event, the amendment was assumed to be valid in the absence of any affirmative showing that the allowance was "so inadequate as to render the regulation not generally fair and equitable", and regardless of the fact that the Administrator made no pretense of showing a "substantial basis" therefor. (R. 80.)

The action of the Emergency Court, therefore, not only sanctions the Administrator's disregard for the requirement laid down by this Court in the *Yakus* case, but it also deprives petitioner of its right of appeal, which is part of the "authorized procedure" provided by the Price Control Act. Such procedure is inherent in due process, and its denial offends against the due process clause of the Fifth Amendment to the Constitution.[6]

Point 3. The refusal of the Emergency Court of Appeals to allow petitioner an adequate markup for prewarehousing functions is in conflict with its decision in Booth Fisheries Corporation v. Bowles.

By refusing to review petitioner's objections to Amendment 32, the Emergency Court, in effect, upheld a regulation

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[6] This Court stated in the *Yakus* case (321 U. S. 434, 88 L. ed. 853):

> "For the purposes of this case, in passing upon the sufficiency of the procedure upon protest to the Administrator and complaint to the Emergency Court, it is irrelevant to suggest that the Administrator or the Court has in the past or may in the future deny due process. *Action taken by them is reviewable in this Court and if contrary to due process will be corrected here.* . . . But upon a full examination of the provisions of the statute it is evident that the authorized procedure *is not incapable* of according the protection to petitioners' rights required by due process." (Emphasis supplied.)

which failed to place petitioner and other direct-buying retailers who perform pre-retail functions in the same position with respect to ceiling prices as other Group 3 and Group 4 retailers who obtain their supplies at a later stage in the distribution process.

On the other hand, in *Booth Fisheries Corporation v. Bowles,* 153 F. (2d) 449, the Emergency Court held that MPR 579 was discriminatory in its application to a wholesaler of fresh and frozen fish insofar as it prohibited the wholesaler, who functioned as a producer, wholesaler, primary distributor and retailer, from taking any markup, other than a processor's, on frozen fish and thus prevented it from charging the level of prices permitted to a competing independent inland wholesaler. The Court pointed out that under this regulation an independent inland wholesaler which procured its frozen fish from a primary distributor or inland warehouse of a processor might charge a higher price than an inland branch organization of the complainant wholesaler which functioned in exactly the same way as the inland wholesaler and procured its frozen fish in an identical fashion. The court stated (p. 451) that——

> ". . . a regulation must be held to be arbitrary and capricious if its provisions are such that all persons who are similarly situated are not dealt with upon an equal basis but greater burdens are laid upon one than are laid upon others in the same calling and condition. . . ."

Thus, the Emergency Court, in deciding these two cases involving similar questions, reached conflicting results.

The question presented in these cases is an important one in the administration of the Act. A final determination of this question is necessary to secure a uniform and impartial policy. This Court should grant certiorari in the present case and resolve this conflict by establishing an

overall policy on the markups to be allowed sellers who perform other functions.

IX

CONCLUSION

It is, therefore, respectfully submitted that this case is one calling for the exercise by this Honorable Court of its supervisory powers in order that the Emergency Court of Appeals may be brought into line with the decisions of this Court and that the review provisions of the Emergency Price Control Act may be given the effect intended by Congress and required by the Constitution; and that to such end a writ of certiorari should be granted, and that this Court should review the judgment of the United States Emergency Court of Appeals and finally reverse it.

Respectfully submitted,

ELISHA HANSON,
ELIOT C. LOVETT,
Counsel for Petitioner.

April 27, 1946.

INDEX

CITATIONS

696382—46——1

In the Supreme Court of the United States

OCTOBER TERM, 1945

No. 1161

SAFEWAY STORES, INCORPORATED, PETITIONER

v.

PAUL A. PORTER, PRICE ADMINISTRATOR

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES EMERGENCY COURT OF APPEALS

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINION BELOW

The opinion of the United States Emergency Court of Appeals (R. 78–80) has not yet been reported.

JURISDICTION

The judgment of the United States Emergency Court of Appeals was entered March 29, 1946 (R. 81). The petition for a writ of certiorari was filed April 27, 1946. Jurisdiction of this Court is invoked under Section 204 (d) of the Emergency Price Control Act of 1942, 56 Stat. 23; 50 U. S. C. App., Supp. IV, Sec. 924 (d), making applicable Section 240 of the Judicial Code, as amended (28 U. S. C. Sec. 347).

QUESTIONS PRESENTED

1. Whether the court below erred in applying the doctrine of *res judicata* to petitioner's contention that Maximum Price Regulation No. 422, as amended, discriminates illegally against petitioner on the ground that it does not permit petitioner to include, when computing prices, an allowance for its pre-retail functions equal to the entire amounts received by independent wholesalers for performing pre-retail functions.

2. Whether the court below erred (1) in holding that the burden was on petitioner to support with evidence its contention that the allowance permitted by Maximum Price Regulation No. 422, as amended, for pre-retail functions was so inadequate as to render the regulation not generally fair and equitable, and (2) in holding that petitioner had wholly failed to meet that burden of proof in the case at bar.

STATUTES AND REGULATIONS INVOLVED

The applicable provisions of the Emergency Price Control Act of 1942, as amended, and the pertinent parts of Maximum Price Regulation No. 422, as amended, are set forth in the Appendix, *infra,* pp. 17–32.

STATEMENT

Maximum Price Regulation No. 422, *infra,* pp. 26–32, issued by the Price Administrator under the authority of Section 2 of the Emergency Price Control Act of 1942, *infra,* pp. 17–20, establishes

maximum prices for groceries sold by all chain food stores and by independent food stores having annual sales amounting to $250,000 or more.[1] This regulation, issued on July 8, 1943, prescribes maximum mark-ups, derived from the historical margin experience of each group of stores, which may be added to the net cost of each item purchased by such stores.

Petitioner operates as a single corporate entity approximately 2,300 retail food stores in the United States (R. 2). On various dates prior to June 1, 1944, petitioner filed two series of protests with the Price Administrator. One of the series attacked the adequacy and fairness of mark-ups available to chain food stores under Maximum Price Regulation No. 422, on the grounds that such mark-ups did not compensate petitioner for pre-retailing functions performed by it, and that the mark-ups discriminated against petitioner and other retail chain food stores, in that such integrated distributors received smaller mark-ups than the total mark-ups available to independent wholesalers and retailers. The other series of protests attacked the validity of the basic classifications of retail food stores included in the several food price regulations. On June 1, 1944, all of these protests were finally denied by the Price

[1] A companion regulation, Maximum Price Regulation No. 423, prescribes maximum prices on grocery products sold by Group 1 and 2 stores, which are independent food stores having annual sales amounting to less than $50,000 and $200,000, respectively. 10 F. R. 1523.

Administrator to the extent that relief had not been granted by certain amendments with respect to the issues involved in the first group of protests while the protest proceedings had been pending. Thereafter, two complaints embodying these protests which had been filed by petitioner in the Emergency Court of Appeals were consolidated and considered by that court (R. 17). On November 29, 1944, the Emergency Court of Appeals dismissed both complaints, holding, *inter alia,* that the mark-ups provided for retailers by Maximum Price Regulation No. 422, which included allowances for pre-retail functions, were generally fair and equitable and did not discriminate against petitioner and other integrated chain retailers. See *Safeway Stores, Inc.* v. *Bowles,* 145 F. 2d 836, certiorari denied, 324 U. S. 847.

Subsequent to the time the two series of protests involved in the case cited above had been filed, the Price Administrator amended Section 20 of Maximum Price Regulation No. 422 by adding thereto a new subsection (p), *infra,* pp. 29–30, (hereinafter referred to as Amendment No. 32), wherein retailers making large quantity purchases of fresh fruits and vegetables at an early stage of the distribution process, were permitted to add 1½% to the net cost bases to which maximum mark-ups were applied (R. 17). The allowance was established at 1½% on the basis of figures submitted to the Administrator by integrated food chains (R. 52). On July 24, 1945, peti-

tioner filed the protest involved in the case at bar in which it attacked the validity of Amendment No. 32 on the grounds that the 1½% additional allowance for pre-retail functions was inadequate to represent fair and equitable compensation, and that the Amendment was, in effect, discriminatory, because it did not place retailers who perform pre-retail functions in the same postion with respect to ceiling prices as other retailers who obtained their supplies at a later stage in the distribution process (R. 2–3). On November 7, 1945, the Price Administrator denied the protest, holding that the issues raised by the protest with respect to discrimination were basically the same as those raised by petitioner in the prior proceeding which had been finally determined by the Emergency Court of Appeals in *Safeway Stores, Inc.* v. *Bowles, supra* (R. 19). The Administrator further held, on the merits of the issue of the adequacy of the allowance, that the petitioner had adduced no evidence to show the inadequacy of the 1½% allowance permitted by Amendment No. 32 (R. 32).

Petitioner thereupon filed a complaint in the Emergency Court of Appeals against the denial of its protest to Amendment No. 32 (R. 62–68). On March 29, 1946, that court, after hearing, dismissed the complaint, holding that petitioner's charge that the regulation discriminated against it was barred by principles of *res judicata,* and that petitioner had failed to meet its burden of

proof that the 1½% allowance permitted by Amendment No. 32 was so inadequate as to render the regulation not generally fair and equitable (R. 79–80). The petition here seeks a review of the judgment of March 29, 1946.

ARGUMENT

1. Petitioner contends that the court below erred in applying the doctrine of *res judicata* to its claim that Maximum Price Regulation No. 422, as modified by Amendment No. 32, works a discrimination against integrated chain food stores which purchase fresh fruits and vegetables at an early stage in the process of distribution. On this point petitioner argues that its objections to Amendment No. 32 could not have been adjudicated in the prior proceeding (*Safeway Stores, Inc.* v. *Bowles, supra*), because that Amendment was promulgated subsequent to the time the protests there involved were filed (Pet. 12–14).

The statements made by the court below in its opinion in the prior case show clearly the issue raised by petitioner in that case with respect to the alleged discriminatory features of Maximum Price Regulation No. 422 in connection with allowances made therein for pre-retail functions. In the course of its opinion in the prior case the court below said:

> The third question raised by the complainant is as to the adequacy of the mark-ups established by the Administrator to compensate the complainant for expenses

incurred by it in the performance of so-called "pre-retail" functions. The complainant is a retailer but has widened the field of its activities to include many of the functions ordinarily performed by commission merchants or brokers, carlot distributors and service wholesalers. Thus it purchases much of its fresh fruits and vegetables directly from the growers and for that purpose establishes and maintains seasonal buying and shipping offices close to the source of supply. It performs all the functions necessary to preserve and transport these commodities in saleable condition. It maintains its own warehouses in many sections of the United States. At these warehouses it receives and inspects all supplies of fresh fruits, vegetables, canned food and packaged food. It cares for and stores these foods, assembles the orders received from its retail stores, loads them on trucks and makes deliveries. It sorts, trims, and bags the fresh fruits. * * *

The complainant contends that the mark-ups permitted by MPR 422 fail to compensate it for expenses incurred by it in performing many of the above enumerated functions both before and after the commodities are received in the warehouses. It urges, moreover, that the denial of compensation for such services is particularly discriminatory because others are given allowances for identical functions and services by MPR 271, MPR 421 and MPR 426,

696382—46——2

> each of which has been ruled to be inapplicable to the complainant because it as a corporation does not "sell" to its own retail stores. (145 F. 2d at 842; R. 25–26.)[2]

Contrary to the impression which petitioner apparently seeks to convey, the court below in the case at bar did not apply the doctrine of *res judicata* to petitioner's objections to Amendment No. 32 beyond the point where those objections attacked the historical price-differential factors which form the basic structure of Maximum Price Regulation No. 422. This is shown by the following excerpt from the opinion in the case at bar, wherein the court observed that:

> The complainant's other objection is that the allowance of 1½% is inadequate to compensate it for the performance of the functions which that allowance was designed to cover. Since Amendment 32 was adopted after the filing of the complainant's earlier protests no estoppel to raise this objection can arise. (R. 79.)

Instead, the court held that the objections grounded on discrimination which petitioner in words directed at Amendment No. 32, were in

[2] MPR 271 (potatoes and onions) and MPR 426 (all other fresh fruits and vegetables for table consumption which are subject to price control) govern sales by growers, country shippers and all independent intermediate sellers, including wholesalers or secondary jobbers. MPR 421 (dry groceries) covers only sales by independent wholesalers to retail stores. These regulations are printed in the Federal Register. See 8 F. R. 7017, 11 F. R. 3864; 8 F. R. 9546, 10 F. R. 8021; and 8 F. R. 9388, 10 F. R. 1496, respectively.

reality directed at the basic structure of Maximum Price Regulation No. 422, and that they were in substance the same as those presented, and found to be without merit, in the prior proceeding between the same parties.[3]

While it is true that the allowance permitted by Amendment No. 32 was not involved in the prior case, it is plain that the objections which petitioner now raises against the alleged discriminatory features of that Amendment, are not in reality against the provisions added to the regulation by that Amendment, but are objections to one of the basic principles which was inherently a part of Maximum Price Regulation No. 422 both before and after the Amendment was added, i. e., application to price control of the historical differentials in the price structures of the various classes of food stores.[4]

In the prior case, petitioner, while attacking the validity of several price regulations relating to

[3] As stated by the court below (R. 79), there is privity between Price Administrator Paul A. Porter, who is respondent herein, and Chester Bowles, his predecessor in office who was respondent in the prior case, so that the lack of identity of the parties does not prevent the application of the rule of *res judicata*. *Sunshine Coal Co.* v. *Adkins*, 310 U. S. 381, 402–403.

[4] The opinion of the Emergency Court of Appeals in the prior case shows that the mark-ups chosen by the Administrator were based upon an exhaustive study of historical food margins made for him by the Bureau of Labor Statistics of the Department of Labor. *Safeway Stores, Inc.*, v. *Bowles*, 145 F. 2d 836, 839.

food, including Maximum Price Regulation No. 422, asserted that the latter regulation was discriminatory on the ground that it made no provision to compensate petitioner for pre-retail functions performed by it, and demanded that petitioner be accorded not only retail mark-ups but also those provided for independent wholesalers (R. 39–42). Petitioner's contention was found to be without merit for the reason that the margins embodied in the regulations themselves reflected the historical margins of the integrated chains for both wholesaling and retailing. *Safeway Stores, Inc.* v. *Bowles,* 145 F. 2d at 843. In the case at bar, petitioner contends that Maximum Price Regulation No. 422, as modified by Amendment No. 32, operates as an invalid discrimination against it because the additional amount which the amended regulation allows for pre-retail functions performed by it is not equal to the entire amounts that are available to independent wholesalers for performing the same kind of functions. However, since Amendment No. 32 did no more than adjust favorably to petitioner, the margins which were already embodied in Maximum Price Regulation No. 422 at the time the prior case arose, it did not remove from that regulation the wholesale margin allowance for integrated chain stores. And, apart from the small additional allowance which the Administrator found it equitable to permit for the purchase of fruits and vegetables in large quantities at a particularly

early stage of the distributive process, the regulation was the same after it was amended as it was before. Consequently, in the case at bar, petitioner's objection, which in words is directed against Amendment No. 32 alone, is in reality directed also against the basic wholesale margin allowance incorporated in the regulation, prior to the Amendment, the non-discriminatory character of which smaller allowance was adjudicated in the prior case against petitioner's identical contention.

It is clear, therefore, that the respective contentions made by petitioner in the two cases that the regulation discriminated against it because it allegedly did not fully compensate petitioner for its pre-retail functions, constituted but a single issue. Hence, petitioner's objections with respect to the alleged discriminatory features of the regulation in connection with pre-retail allowances are identical in the two cases, and since that issue was decided against petitioner in the prior case, the court below committed no error in holding that petitioner was barred by the principles of *res judicata* from raising the same issue again in the case at bar. See *Grubb* v. *Public Utilities Commission of Ohio,* 281 U. S. 470; *United States* v. *Moser,* 266 U. S. 236, 241; *Cromwell* v. *County of Sac,* 94 U. S. 351; *In re Barratt's Appeal,* 14 App. D. C. 255.

2. Petitioner's direct objection to Amendment No. 32 appears to be that the additional 1½% allowance provided therein for pre-retail func-

tions performed by it is so inadequate as to render the Amendment generally unfair and inequitable. Petitioner endeavors to support this contention with the statements contained in its protest, which show a disparity between the 1½% additional allowance made available to petitioner by Amendment No. 32 for performing pre-retail functions and the total amount which independent wholesalers may receive for the purchase and resale of goods at the same levels of distribution embraced in petitioner's integrated operation. As has been noted, *supra,* pp. 8–11, this contention is nothing more than the renewal of the attack upon the structure of the regulation, which was found to be without merit in the prior proceeding. Plainly, such comparisons have no real bearing upon the adequacy of the 1½% allowance provided for by Amendment No. 32, since that allowance is but an addition to the allowance for wholesaling functions performed by integrated chain-stores which was included in the historical margins embodied in Maximum Price Regulation No. 422 prior to the time Amendment No. 32 was added to the regulation. It is patent that the disparity existing between the additional 1½% made available by Amendment No. 32 and the total amount received by independent wholesalers does not prove the inadequacy of the combined amounts made available to petitioner by the mark-ups and the Amendment. Hence, petitioner wholly failed to offer any competent evidence that the entire allowance, com-

posed of the amounts contained in the mark-ups and the 1½% provided by Amendment No. 32, is inconsistent with its historical margin experience or is inadequate to compensate it for the pre-retail functions which it performs.

Section 204 (b) of the Emergency Price Control Act, *infra,* pp. 23–24, expressly provides that no regulation shall be set aside in whole or in part unless the complainant establishes to the satisfaction of the court that the regulation is not in accordance with law, or is arbitrary or capricious. In the circumstances, we submit that the court below was clearly right in holding that the burden was on petitioner to show by competent evidence that the regulation was not generally fair and equitable, and that petitioner had wholly failed to meet the burden of proof in this case. Cf. *Pacific States Box & Basket Co.* v. *White,* 296 U. S. 176, 185; *Borden's Farm Products Co.* v. *Baldwin,* 293 U. S. 194, 209.

Petitioner also urges that there was no "substantial basis" for Amendment No. 32 because the statement of considerations which accompanied it at the time of issuance showed that the 1½% allowance was based on a preliminary study, and that the amendment was tentative in nature and designed as a corrective measure pending a further and complete economic survey which was never made. However, Section 2 of the Emergency Price Control Act, *infra,* p. 17, authorizes the Administrator to establish such maximum

prices as in his judgment will be generally fair and equitable and will effectuate the purposes of the Act, and provides that every regulation shall be accompanied by a statement of considerations involved in the issuance of the regulation. Manifestly, the Act does not require the Administrator to include in the statement of considerations all of the economic data and other facts employed in the formulation of the regulation. Thus, it cannot reasonably be said that the failure of the Administrator to include such material in the statement of considerations relieves a complainant from the statutory burden of showing that the regulation is arbitrary or capricious. In any event, petitioner's contention is answered in the statement made by the Administrator, in denying the protest, that the 1½% allowance was based on figures submitted by the integrated chains themselves, and that in view of the continuing favorable financial position of the chain-store segment of the food industry and the lack of evidence of the inadequacy of the allowance, a further survey was thought unnecessary (R. 32). In the circumstances the court below rightly held that the failure of the Administrator to make a further survey did not relieve the petitioner of its burden of proof.

3. Petitioner asserts (Pet. 21–23) that the decision of the court below in the case at bar is in conflict with the decision of the same court in the case of *Booth Fisheries Corporation* v. *Bowles,*

153 F. 2d 449. In the *Booth Fisheries* case the court below set aside Maximum Price Regulation No. 579, dealing with fresh and frozen fish in so far as it established different maximum prices for sales of these commodities at wholesale by integrated and non-integrated sellers. In the case at bar the court below held simply that petitioner had not proved that the 1½% allowance was so inadequate as to render the regulation not generally fair and equitable (R. 80). The *Booth* case involved the validity of differentiated prices which had been established for persons making sales at the same level of distribution without regard to quantity, and functioning in exactly the same way in a situation where there was no historical price differential. The case at bar does not involve the problem of an alleged discrimination between sellers making sales to intermediate handlers, and there is nothing in the record in the instant case to show that petitioner is denied the same maximum prices as intermediate sellers, if and when it makes sales of fresh fruits and vegetables at an early stage in the distribution process. There is, therefore, no conflict between the two decisions of the court below.

696382—46——3

CONCLUSION

The decision below is clearly correct, and there is no conflict of decisions. It is respectfully submitted that the petition should be denied.

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JUNE 1946.

APPENDIX

Pertinent provisions of the Emergency Price Control Act of 1942, as amended (56 Stat. 23, 765; 58 Stat. 632; 59 Stat. 306; 50 U. S. C. App., Supp. IV, 902, 923, 924), are as follows:

> SEC. 2. (a) Whenever in the judgment of the Price Administrator (provided for in section 201) the price or prices of a commodity or commodities have risen or threaten to rise to an extent or in a manner inconsistent with the purposes of this Act, he may by regulation or order establish such maximum price or maximum prices as in his judgment will be generally fair and equitable and will effectuate the purposes of this Act. So far as practicable, in establishing any maximum price, the Administrator shall ascertain and give due consideration to the prices prevailing between October 1 and October 15, 1941 (or if, in the case of any commodity, there are no prevailing prices between such dates, or the prevailing prices between such dates are not generally representative because of abnormal or seasonal market conditions or other cause, then to the prices prevailing during the nearest two-week period in which, in the judgment of the Administrator, the prices for such commodity are generally representative), for the commodity or commodities included under such regulation or order, and shall make adjustments for such relevant factors as he may determine and deem to be of general applicability, including the following: Speculative

fluctuations, general increases or decreases in costs of production, distribution, and transportation, and general increases or decreases in profits earned by sellers of the commodity or commodities, during and subsequent to the year ended October 1, 1941: *Provided*, That no such regulation or order shall contain any provision requiring the determination of costs otherwise than in accordance with established accounting methods. Every regulation or order issued under the foregoing provisions of this subsection shall be accompanied by a statement of the considerations involved in the issuance of such regulation or order. As used in the foregoing provisions of this subsection, the term "regulation or order" means a regulation or order of general applicability and effect. Before issuing any regulation or order under the foregoing provisions of this subsection, the Administrator shall, so far as practicable, advise and consult with representative members of the industry which will be affected by such regulation or order, and shall give consideration to their recommendations. In the case of any commodity for which a maximum price has been established, the Administrator shall, at the request of any substantial portion of the industry subject to such maximum price, regulation, or order of the Administrator, appoint an industry advisory committee, or committees, either national or regional or both, consisting of such number of representatives of the industry as may be necessary in order to constitute a committee truly representative of the industry, or of the industry in such region, as the case may be. The committee shall select a chairman from among its members, and shall meet at the call of the

chairman. The Administrator shall from time to time, at the request of the committee, advise and consult with the committee with respect to the regulation or order, and with respect to the form thereof, and classifications, differentiations, and adjustments therein. The committee may make such recommendations to the Administrator as it deems advisable, and such recommendations shall be considered by the Administrator. Whenever in the judgment of the Administrator such action is necessary or proper in order to effectuate the purposes of this Act, he may, without regard to the foregoing provisions of this subsection, issue temporary regulations or orders establishing as a maximum price or maximum prices the price or prices prevailing with respect to any commodity or commodities within five days prior to the date of issuance of such temporary regulations or orders; but any such temporary regulation or order shall be effective for not more than sixty days, and may be replaced by a regulation or order issued under the foregoing provisions of this subsection.

* * * * *

(c) Any regulation or order under this section may be established in such form and manner, may contain such classifications and differentiations, and may provide for such adjustments and reasonable exceptions, as in the judgment of the Administrator are necessary or proper in order to effectuate the purposes of this Act. Under regulations to be prescribed by the Administrator, he shall provide for the making of individual adjustments in those classes of cases where the rent on the maximum rent date for any housing accommodations

is, due to peculiar circumstances, substantially higher or lower than the rents generally prevailing in the defense-rental area for comparable housing accommodations, and in those classes of cases where substantial hardship has resulted since the maximum rent date from a substantial and unavoidable increase in property taxes or operating costs. Any regulation or order under this section which establishes a maximum price or maximum rent may provide for a maximum price or maximum rent below the price or prices prevailing for the commodity or commodities, or below the rent or rents prevailing for the defense-area housing accommodations, at the time of the issuance of such regulation or order.

* * * * *

SEC. 203. (a) At any time after the issuance of any regulation or order under section 2, or in the case of a price schedule, at any time after the effective date thereof specified in section 206, any person subject to any provision of such regulation, order, or price schedule may, in accordance with regulations to be prescribed by the Administrator, file a protest specifically setting forth objections to any such provision and affidavits or other written evidence in support of such objections. Statements in support of any such regulation, order, or price schedule may be received and incorporated in the transcript of the proceedings at such times and in accordance with such regulations as may be prescribed by the Administrator. Within a reasonable time after the filing of any protest under this subsection, but in no event more than thirty days after such filing, the Administrator shall either grant or deny such protest in

whole or in part, notice such protest for hearing, or provide an opportunity to present further evidence in connection therewith. In the event that the Administrator denies any such protest in whole or in part, he shall inform the protestant of the grounds upon which such decision is based, and of any economic data and other facts of which the Administrator has taken official notice.

(b) In the Administration of this Act the Administrator may take official notice of economic data and other facts, including facts found by him as a result of action taken under section 202.

(c) Any proceedings under this section may be limited by the Administrator to the filing of affidavits, or other written evidence, and the filing of briefs: *Provided, however,* That, upon the request of the protestant, any protest filed in accordance with subsection (a) of this section after September 1, 1944, shall, before denial in whole or in part, be considered by a board of review consisting of one or more officers or employees of the Office of Price Administration designated by the Administrator in accordance with regulations to be promulgated by him. Such regulations shall provide that the board of review may conduct hearings and hold sessions in the District of Columbia or any other place, as a board, or by subcommittees thereof, and shall provide that, upon the request of the protestants and upon a showing that material facts would be adduced thereby, subpenas shall issue to procure the evidence of persons, or the production of documents, or both. The Administrator shall cause to be presented to the board such evidence, including economic data, in the form of

affidavits or otherwise, as he deems appropriate in support of the provision against which the protest is filed. The protestant shall be accorded an opportunity to present rebuttal evidence in writing and oral argument before the board and the board shall make written recommendations to the Price Administrator. The protestant shall be informed of the recommendations of the board and, in the event that the Administrator rejects such recommendations in whole or in part, shall be informed of the reasons for such rejection.

* * * * *

SEC. 204. (a) Any person who is aggrieved by the denial or partial denial of his protest may, within thirty days after such denial, file a complaint with the Emergency Court of Appeals, created pursuant to subsection (c), specifying his objections and praying that the regulation, order, or price schedule protested be enjoined or set aside in whole or in part. A copy of such complaint shall forthwith be served on the Administrator, who shall certify and file with such court a transcript of such portions of the proceedings in connection with the protest as are material under the complaint. Such transcript shall include a statement setting forth, so far as practicable, the economic data and other facts of which the Administrator has taken official notice. Upon the filing of such complaint the court shall have exclusive jurisdiction to set aside such regulation, order, or price schedule, in whole or in part, to dismiss the complaint, or to remand the proceeding: *Provided,* That the regulation, order, or price schedule may be modified or rescinded by the Administrator at any time notwith-

standing the pendency of such complaint. No objection to such regulation, order, or price schedule, and no evidence in support of any objection thereto, shall be considered by the court, unless such objection shall have been set forth by the complainant in the protest or such evidence shall be contained in the transcript. If application is made to the court by either party for leave to introduce additional evidence which was either offered to the Administrator and not admitted, or which could not reasonably have been offered to the Administrator or included by the Administrator in such proceedings, and the court determines that such evidence should be admitted, the court shall order the evidence to be presented to the Administrator. The Administrator shall promptly receive the same, and such other evidence as he deems necessary or proper, and thereupon he shall certify and file with the court a transcript thereof and any modification made in the regulation, order, or price schedule as a result thereof; except that on request by the Administrator, any such evidence shall be presented directly to the court.

(b) No such regulation, order, or price schedule shall be enjoined or set aside, in whole or in part, unless the complainant establishes to the satisfaction of the court that the regulation, order, or price schedule is not in accordance with law, or is arbitrary or capricious. The effectiveness of a judgment of the court enjoining or setting aside, in whole or in part, any such regulation, order, or price schedule shall be postponed until the expiration of thirty days from the entry thereof, except that if a petition for a writ of certiorari is filed with the Supreme Court under subsection (d)

within such thirty days, the effectiveness of such judgment shall be postponed until an order of the Supreme Court denying such petition becomes final, or until other final disposition of the case by the Supreme Court.

(c) There is hereby created a court of the United States to be known as the Emergency Court of Appeals, which shall consist of three or more judges to be designated by the Chief Justice of the United States from judges of the United States district courts and circuit courts of appeals. The Chief Justice of the United States shall designate one of such judges as chief judge of the Emergency Court of Appeals, and may, from time to time, designate additional judges for such court and revoke previous designations. The chief judge may, from time to time, divide the court into divisions of three or more members, and any such division may render judgments as the judgment of the court. Two judges shall constitute a quorum of the court and of each division thereof. The court shall have the powers of a district court with respect to the jurisdiction conferred on it by this Act; except that the court shall not have power to issue any temporary restraining order or interlocutory decree staying or restraining, in whole or in part, the effectiveness of any regulation or order issued under section 2 or any price schedule effective in accordance with the provisions of section 206. The court shall exercise its powers and prescribe rules governing its procedure in such manner as to expedite the determination of cases of which it has jurisdiction under this Act. The court may fix and establish a table of costs and fees to be approved by

the Supreme Court of the United States, but the costs and fees so fixed shall not exceed with respect to any item the costs and fees charged in the Supreme Court of the United States. The court shall have a seal, hold sessions at such places as it may specify, and appoint a clerk and such other employees as it deems necessary or proper.

(d) Within thirty days after entry of a judgment or order, interlocutory or final, by the Emergency Court of Appeals, a petition for a writ of certiorari may be filed in the Supreme Court of the United States, and thereupon the judgment or order shall be subject to review by the Supreme Court in the same manner as a judgment of a circuit court of appeals as provided in section 240 of the Judicial Code, as amended (U. S. C., 1934 edition, title 28, sec. 347). The Supreme Court shall advance on the docket and expedite the disposition of all causes filed therein pursuant to this subsection. The Emergency Court of Appeals, and the Supreme Court upon review of judgments and orders of the Emergency Court of Appeals, shall have exclusive jurisdiction to determine the validity of any regulation or order issued under section 2, of any price schedule effective in accordance with the provisions of section 206, and of any provision of any such regulation, order, or price schedule. Except as provided in this section, no court, Federal, State, or Territorial, shall have jurisdiction or power to consider the validity of any such regulation, order, or price schedule, or to stay, restrain, enjoin, or set aside, in whole or in part, any provision of this Act authorizing the issuance of such regulations or orders, or making effective any such price schedule, or any

provision of any such regulation, order, or price schedule, or to restrain or enjoin the enforcement of any such provision.

Pertinent provisions of Maximum Price Regulation 422, as amended (10 F. R. 1505, 2024, 6514):

SECTION 1. *What this regulation does.* This regulation fixes new ceiling prices for the "dry groceries" listed in Table A and the "perishables" listed in Table B for all retail stores, other than "independent" retail stores, doing an annual business of less than $250,000, and for all retail stores, whether "independent" or not, doing an annual business of more than $250,000. These new ceiling prices are to be used instead of the ceiling prices figured under any other price regulation or order issued by the Office of Price Administration (hereinafter called OPA) except as otherwise provided in any order fixing dollars-and-cents ceiling prices which has been or which may be issued by the OPA pursuant to General Order No. 51. All other retail stores (Group 1 and Group 2 stores) selling these food products are covered by Maximum Price Regulation No. 423.

SEC. 2. *How you find out whether your store is covered by this regulation and what group it is in*—(a) *What stores are covered.* Your store is covered by this regulation if it is a Group 3 or 4 store as defined below and if you are a retailer who buys and resells food products, generally without materially changing their form, for the most part to ultimate consumers who are not commercial industrial or institutional users. The provisions of this regulation apply to "retail route sellers" only with respect to fresh fruits and vegetables. However, this

regulation does not apply to "health food stores," or to automatic vending machines or farmers selling produce grown on their own farms.

(b) *What are Group 3 and 4 stores.* For the purpose of this regulation, Group 3 and 4 stores are defined as follows:

(1) *Group 3.* Your store is in Group 3 if its "annual gross sales" are less than $250,000, and if it is not an "independent" store. Your store is an "independent" store if it is not one of 4 or more stores under one ownership whose combined "annual gross sales" are $500,000 or more.

(2) *Group 4.* Your store is in Group 4 if its "annual gross sales" are $250,000 or more.

* * * * *

Perishables

SEC. 7. *How and when you figure your ceiling prices for "perishables"*—(a) *General rule.* Your ceiling price for each item (that is, for each kind, brand, variety, and grade) of "perishables" listed in Table B shall be the total of (1) the "net cost" of the largest delivery of the item to you during the week before, plus (2) the mark-up given you for it in Table B.

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SEC. 8. *Directions for applying the rule for "perishables"*—(a) *Net cost.* To figure your ceiling price, first find the "net cost" of the largest delivery to you of the item during the seven day period before the Thursday for which you are figuring your price. If you have received more than one delivery of the same largest quantity, use the most recent of these deliveries. Your net cost will be the amount you paid your supplier less all discounts except the dis-

count for prompt payment, plus all transportation charges you paid, which may include costs for icing refrigeration, and ventilation, but which may not include costs for local trucking and local unloading.

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SEC. 20. *How you figure your "net cost" in certain cases—*

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(f) *White potatoes purchased by you ungraded and unsacked.* If you purchase ungraded and unsacked white potatoes at a country shipping point (as defined in Revised Maximum Price Regulation 271) and you grade and sack such potatoes, you shall figure a separate ceiling price weekly for each grade and variety, using as your "net cost" per "selling unit" the lowest ceiling price per 100 pounds fixed by Revised Maximum Price Regulation 271 for sales by a country shipper f. o. b. country shipping point of such grade and variety, adjusted by the applicable packaging differential, during the month in which you receive delivery at your usual receiving point, plus all transportation charges you paid (except local trucking and local unloading) to your usual receiving point, divided by 100, and multiplied by 5.

(g) *Dry onions purchased by you ungraded and unsacked.* If you purchase ungraded and unsacked dry onions at a country shipping point (as defined in Revised Maximum Price Regulation 271) and you grade and sack such onions, you shall figure a separate ceiling price weekly for each grade and variety, using as your "net cost" per "selling unit" the lowest ceiling price per 50 pounds fixed by Maximum Price Regulation 271 for sales by a country shipper f. o. b. country shipping point of

such grade and variety, adjusted by the applicable packaging differentials, during the month in which you receive delivery at your usual receiving point, plus all transportation charges you paid (except local trucking and local unloading) to your usual receiving point, divided by 50 and multiplied by 3.

(h) *Citrus fruits purchased by you ungraded, unsized and unpacked.* If you purchase ungraded, unsized and unpacked citrus fruits and you grade, size and pack such citrus fruits, you shall figure on such purchases a separate ceiling price weekly for each variety, and size, and fruit from different areas, using as the basis of your "net cost" for each variety, and size, and fruit from different areas, the lowest ceiling price fixed in Maximum Price Regulation No. 292 for sales by a packer of such variety, size, and fruit in the type of container in which each item is packed, in effect at the time when you receive delivery at your usual receiving point, plus all transportation charges you paid (except local trucking and local unloading) to your usual receiving point. To get your ceiling price, reduce the resulting figure to the "net cost" of the "selling unit", and apply the mark-up for your group of retailer as set forth in section 8.

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(p) *Fresh fruits or vegetables bought in carlot or trucklot quantities.* If you purchase any item of fresh fruits or vegetables listed in Table B, in "carlot" or "trucklot" quantities, from a "grower", "country shipper", "primary seller" or "grower-packer" (as those terms are defined in the applicable maximum price regulation covering the sale of the item except at retail),

figure your ceiling price for that item in the following way: Start with the amount paid for the quantity of the item delivered, less all discounts except the discount for prompt payment. Add to that figure all transportation charges you paid to your usual receiving point, which may include costs for icing, refrigeration, and ventilation, but not costs for local trucking or local unloading. (If you perform, in connection with any item, any of the functions described in paragraphs (f), (g), (h), (q) or (r) of this section, start with the figure computed for that item under the applicable paragraph.) Increase that figure by 1½ percent. Reduce the resulting figure to the "net cost" per "selling unit" and apply the mark-ups for your group of retailer as set forth in section 8.

SEC. 39. *Table of mark-ups for "perishables" (Table B)*—(a) *Table B: Mark-ups over "net cost" allowed to Group 3 and Group 4 retailers for "perishables" covered by this regulation by commodities*

TABLE B—MARK-UPS OVER "NET COSTS" ALLOWED TO GROUP 3 AND GROUP 4 RETAILERS FOR PERISHABLES COVERED BY THIS REGULATION BY COMMODITIES

1. Food commodities	Allowed mark-ups over net cost		"Selling unit" in which ceiling price must be calculated
	Group 3. Retailer other than independent with annual volume under $250,000	Group 4. Any retailer with annual volume of $250,000 or more	
(1) Dairy products:	*Percent*	*Percent*	
Butter	8	8	1 pound.
Cheese	24	22	1 pound or 1 package.
Eggs, shell	14	12	1 dozen.
(2) Fresh fruits:			
Apples	33	33	2 pounds.
Bananas, bought on the stem	34	34	1 pound.
Bananas, bought in hands	25	25	1 pound.
Berries	34	34	1 quart, 1 pint or 1 pound.
Citrus fruits	36	36	1 dozen or 8 pounds. (Grapefruit, 1 grapefruit or 1 pound).
Red sour cherries	34	34	1 quart or 1 pound.

I. Food commodities	Allowed mark-ups over net cost		"Selling unit" in which ceiling price must be calculated
	Group 3. Retailer other than independent with annual volume under $250,000	Group 4. Any retailer with annual volume of $250,000 or more	
(3) Fresh vegetables:			
Lettuce	40	40	1 head or 1 pound.
Onions, dry	40	35	3 pounds.
Potatoes, sweet	40	40	2 pounds.
Potatoes, white	30	28	5 pounds.
Tomatoes	40	40	1 pound or 1 package.
Vegetables in unbroken packages.	40	40	1 package.
(4) Poultry:			
Poultry (except turkey) sold as purchased: Bought live and sold live, bought dressed and sold dressed, bought drawn and sold drawn, bought frozen and sold frozen, bought kosher-killed and sold kosher-killed, bought kosher dressed and plucked and sold kosher dressed and plucked, bought split or cut-up and sold split or cut-up (boxed and other pack).	20	20	1 pound.
Poultry (including turkey) bought live and sold dressed weight basis. (Multiply live cost per pound by applicable figure in table. This establishes selling price per pound, dressed weight.)	36	36	1 pound.
Turkey bought live and sold live.	20	20	1 pound.
Turkey bought dressed and sold dressed, bought kosher-killed and sold kosher-killed, bought kosher dressed and plucked and sold kosher dressed and plucked, bought drawn and sold drawn, bought frozen and sold frozen, bought split and sold split, bought cut-up and sold cut-up (boxed and other pack).	17	15	1 pound.

II. Food commodities	Allowed dollars-and-cents mark-ups per "selling unit"		"Selling unit" in which ceiling price must be calculated
	Group 3. Retailer other than independent with annual volume under $250,000	Group 4. Any retailer with annual volume of $250,000 or more	
(1) Dairy products:			
(2) Fresh fruits:	*Cents*	*Cents*	
Apricots	4½	4½	1 pound.
Cherries, sweet	9	9	1 pound.
Coconuts	1½	1½	1 pound.
Cranberries	10	10	1 pound.
Melons, except watermelons	2½	2½	1 pound.
Peaches	3½	3½	1 pound.
Pears	4	4	1 pound.
Plums	4½	4½	1 pound.
Prunes, Italian	3	3	1 pound.
Watermelons	1	1	1 pound.
(3) Fresh vegetables:			
Beans, green and wax	4	4	1 pound.
Carrots, bunched	2½	2½	1 bunch.
Carrots, other than bunched	2	2	1 pound.
Cucumbers, except hothouse cucumbers.	2½	2½	1 pound.
Cucumbers, hothouse	6½	6½	1 pound.
Eggplant	3	3	1 pound.
Peas, green	5	5	1 pound.
Peppers, sweet	4½	4½	1 pound.
Spinach	3	3	1 pound.
(4) Poultry:			

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